IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 829 of 1995

Ramnath Gokul Prasad Verma .. Appellant

versus

Shree Dattaguru Co-op Housing

Society Ltd. & ors. .. Respondents

...

Mr.S.K. Dubey for the appellant.

Mr.K.Y. Mandlik for the respondents.

CORAM : B.H. MARLAPALLE,J

DATED : 11th October 2005

P.C.:

1. This appeal arises from the order dated 13th April 1995 passed by the learned Judge of the City Civil Court at Mumbai dismissing Notice of Motion 485 of 1995 taken out in S.C. Suit no.3245 of 1986 taken out under Order XXXIX Rule 2A of the Code of Civil

Procedure seeking to punish by detaining the defendant in civil prison for a term not exceeding three months.

2. Appeal was admitted on 17th July 1995.

3. Section 104 of the Code of Civil Procedure provides for appeals from orders and sub-section (1) of the said section states that an appeal shall lie from the orders stated thereunder and save as otherwise expressly provided in the body of the Code or by any law for the time being in force and from no other orders. Clause (h) of sub-section (1) of section 104 provides for an appeal against an order under any of the provisions of the Code imposing a fine or directing the arrest or retention in the civil prison of any person except whether such arrest of detention is in execution of the decree. It it thus clear that if an application/Notice of Motion moved under Order XXXIX Rule 2-A is allowed by the trial Court and the defendant is ordered to be arrested or detained in the civil prison, an apeal from the said order would lie. Order XXXXIII Rule 1 also deals with appeals from orders and states that an appeal shall lie from the orders stated

thereunder, u/s.104 Clause (r) of Rule 1 Order XXXXIII reads as under :

> "An order under Rule 1, Rule 2, Rule 2-A, Rule 4 or Rule 10 of Order XXXIX.

This clause has been amended in Maharashtra with effect from 1.10.1983 and it has been substituted as under:-

> "(r) An order under Rule 1, Rule 2, Rule 4, Rule 10 or Rule 11 of Order XXXIX.

It is therefore clear that the words "Rule 2A" have been deleted and the words "Rule 11"’ have been added in the amendment carried out and as applicable to the Bombay High Court. Thus, section 104 (1)(h) does not provide for a remedy of an appeal from an order dismissing an application/notice of motion filed under Order XXXIX Rule 2-A of the Code of Civil Procedure and an appeal cannot be entertained unless it is so provided for, and it is well settled

that the remedy of appeal is a statutory remedy and if the statute concerned does not provide for such a remedy, an appeal cannot be entertained. Though the instant appeal has been admitted that itself will not be a reason to decide this appeal on merits now.

4. The appeal is therefore dismissed as not maintainable and it is clarified that this order would not preclude the appellant from persuading Contempt Petition No.366 of 1995 or any such proceedings that are permissible in law.

B.H. MARLAPALLE, J